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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CHEMICAL MANUFACTURERS ASSOCIATION, *et al.*,
AMERICAN IRON & STEEL INSTITUTE, *et al.*,
AMERICAN PAPER INSTITUTE, *et al.*,
AMERICAN PETROLEUM INSTITUTE, *et al.*,
AMERICAN TEXTILE MANUFACTURERS INSTITUTE,
NATIONAL COAL ASSOCIATION, and
VIRGINIA ELECTRIC AND POWER COMPANY, *et al.*,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY and
ANNE M. GORSUCH, ADMINISTRATOR, U.S.
ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

THEODORE L. GARRETT
PATRICIA A. BARALD
CORINNE A. GOLDSTEIN
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
(202) 662-6000
Attorneys for Petitioners
Chemical Manufacturers Association, et al.

May 1982

QUESTIONS PRESENTED

The decision at issue involves fundamental questions as to the proper court for judicial review of Environmental Protection Agency ("EPA") regulations under the Clean Water Act ("CWA" or "the Act"). The D.C. Circuit has asserted direct appellate jurisdiction under Section 509(b)(1) of the Act, 33 U.S.C. § 1369(b)(1), over challenges to EPA's general policy and procedural regulations governing the grant or denial of National Pollutant Discharge Elimination System ("NPDES") permits. In doing so, it specifically rejected the contrary reasoning of a decision of the Third Circuit, and upset settled expectations as to the limited breadth of appellate jurisdiction under the Act. The questions presented are:

1. Whether EPA's procedural regulations governing the grant or denial of NPDES permits, 40 C.F.R. Parts 122-125 (1980), constitute "effluent limitation[s] or other limitation[s]" under Section 509(b)(1) of the Act, reviewable in the courts of appeals.

2. Whether the court below exceeded the statutory limits on its jurisdiction under Section 509(b)(1) of the Act, and misinterpreted prior decisions of this Court, in asserting appellate jurisdiction over the NPDES permit regulations.

PARTIES

The parties to this action are as follows:[1]

Chemical Manufacturers Association, Virginia Manufacturers Association, Inc., Virginia Chemicals, Inc., American Cyanamid Company, Borden Inc., E. I. du Pont de Nemours & Co., FMC Corporation, Kaiser Aluminum & Chemical Company, Monsanto Company, Northern Petrochemical Company, Olin Corporation, PPG Industries, Inc., Rohm and Haas Company, Stauffer Chemical Company, The B. F. Goodrich Company, The Goodyear Tire & Rubber Company, Union Carbide Corporation;

American Iron & Steel Institute, Allegheny Ludlum Steel Corporation, Armco Inc., Bethlehem Steel Corporation, Cyclops Corporation, Inland Steel Company, Jones & Laughlin Steel Corporation, National Steel Corporation, Republic Steel Corporation, United States Steel Corporation;

American Paper Institute, National Forest Products Association;

American Petroleum Institute, Atlantic Richfield Company, Chevron U.S.A., Inc., Conoco Inc., Exxon Corporation, Getty Oil Corporation, Gulf Oil Corporation, Marathon Oil Company, Mobil Oil Corporation, Phillips Petroleum Company, Shell Oil Company, Standard Oil Company (Indiana), Texaco Inc., Union Oil Company of California;

American Textile Manufacturers Institute;

Burlington Industries, Inc.;

Citizens for a Better Environment;

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[1] In accordance with Rule 28.1 of the Rules of the Supreme Court, the parent companies, subsidiaries and affiliates of each corporate party to this petition are set forth in the Appendix at A-17.

Ford Motor Company;

General Motors Corporation;

Kennecott Corporation;

National Coal Association;

Natural Resources Defense Council, Inc.;

Pennzoil Company;

State of West Virginia;

Tenneco Oil Company;

United Technologies Corporation; and

Virginia Electric and Power Company, Alabama Power Company, Allegheny Power System, Inc., American Electric Power Company, Inc., Baltimore Gas & Electric Company, Boston Edison Company, Carolina Power & Light Company, Central and South West Services, Inc., Central Illinois Light Company, Central Illinois Public Service Company, Cincinnati Gas & Electric Company, Cleveland Electric Illuminating Company, Columbus & Southern Ohio Electric Co., Commonwealth Edison Company, Consolidated Edison Company of New York, Inc., The Dayton Power & Light Company, Delmarva Power & Light Company, Detroit Edison Company, Duke Power Company, Edison Electric Institute, Florida Power & Light Company, Gulf States Utilities Company, Houston Lighting & Power Company, Illinois Power Company, Indianapolis Power & Light Company, Iowa Public Service Company, Kansas City Power & Light Company, Long Island Lighting Company, Madison Gas and Electric Company, Middle South Utilities, Inc., Minnesota Power & Light Company, Montaup Electric Company, National Rural Electric Cooperative Association, New England Power Company, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Northeast Utilities Services Company, Northern Indiana Public Service

Company, Northern States Power Company (Minn.), Ohio Edison Company, Oklahoma Gas and Electric Company, Pacific Gas & Electric Company, Pennsylvania Power & Light Company, Philadelphia Electric Company, Potomac Electric Power Company, Public Services Electric & Gas Company, Public Service Company of Indiana, Inc., Rochester Gas & Electric Company, San Diego Gas & Electric Company, South Carolina Electric & Gas Company, Southern California Edison Company, The Southern Company, Tampa Electric Company, Texas Utilities Company, Toledo Edison Company, Union Electric Company, Wisconsin Electric Power Company, Wisconsin Power & Light Company, Wisconsin Public Service Corporation. [2]

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[2] The foregoing list comprises the petitioners who challenged EPA regulations promulgated pursuant to the Clean Water Act and who therefore had an interest in the decision below. In the proceedings below, the D.C. Circuit has also consolidated petitions challenging EPA regulations under other statutes. The latter petitioners, who did not participate in the D.C. Circuit's consideration of the jurisdictional issue involved here, are as follows: Continental Oil Company, The Standard Oil Company (Ohio), The Ferroalloys Association, Allegheny Ludlum Industries, Inc., Kimberly-Clark Corporation, Mining and Reclamation Council of America, Inc., Avtex Fibers, Inc., Edison Electric Institute, *et al.*, Stablex Corporation, American Wood Preservers Institute, G + W Natural Resources Group, American Chrome & Chemicals, Inc., Linden Chemicals & Plastics, Inc., Polysar Limited, The Lubrizol Corporation, Allied Chemical Corporation, The Dow Chemical Company, American Mining Congress, *et al.*, AMAX, Inc., Texas Oil & Gas Corp., National Solid Wastes Management Association, Cincinnati Gas & Electric Company, Atlantic Cement Company, Inc., *et al.*, Tennessee Gas Transmission Company, Colt Industries Inc., Kaiser Steel Corporation, Lone Star Steel Company, Wheeling-Pittsburgh Steel Corporation, Kerr-McGee Nuclear Corporation, Kerr-McGee Refining Corporation, Kerr-McGee Corporation, State of Texas, Duval Corporation, Everest Minerals Corporation, Jefferson Lake Sulphur Company (a division of Occidental Chemical Company), Texasgulf Inc., Independent Petroleum Association of America, and Mid-Continent Oil and Gas Association.

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Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY and
ANNE M. GORSUCH, ADMINISTRATOR, U.S.
ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Chemical Manufacturers Association, *et al.*, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit in this case involving the parties named in the above caption.

OPINION BELOW

The opinion of the court of appeals below is unofficially reported at 17 E.R.C. 1007, and is reprinted in the Appendix to this petition at A-1.

JURISDICTION

The order of the court of appeals was entered on March 2, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 509(b)(1) of the CWA, 33 U.S.C. § 1369(b)(1), vests the federal courts of appeals with original jurisdiction to review six specified categories of EPA action, including action:

> "in approving or promulgating any effluent limitation or other limitation under section 1311, 1312 or 1316 [of the CWA]." 33 U.S.C. § 1369(b)(1)(E).

With limited exceptions, review of EPA action within the six Section 509(b)(1) categories must be sought within 90 days of the date of the challenged action. Section 509(b)(2) of the Act provides that "[a]ction of the Administrator with respect to which review could have been obtained under [§ 509(b)(1)] shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. § 1369(b)(2). Section 509(b)(1) of the Act is set forth below at 14-15.

EPA's regulations governing the procedures for issuing NPDES permits are codified at 40 C.F.R. Parts 122-125.

STATEMENT OF THE CASE

This petition raises a central issue as to the scheme for judicial review of agency action under the Clean Water Act. It is of fundamental importance that the means for seeking judicial review, and the court in which review must be sought, be unambiguous. Petitioners are seeking certiorari because the decision below has created a conflict in the circuits and has upset settled expectations as to the courts which must review EPA actions under the Clean Water Act.

This petition seeks review of a judgment of the D.C. Circuit which broadly and improperly expands court of appeals jurisdiction to cover review of EPA's policy and procedural permit regulations under the Clean Water Act, despite the absence of any explicit reference to such regulations in the applicable judicial review provisions of the Act. The decision below misconstrues a decision of this Court and involves a recurring issue of considerable importance.

A. Legislative And Administrative Background

Congress purposely split jurisdiction over review of EPA's actions under the CWA between the courts of appeals and the district courts. In sharp contrast to the jurisdictional provisions of other environmental statutes, where Congress chose to vest the courts of appeals with jurisdiction to review all agency actions,[1] Congress deliberately limited appellate review under the CWA to six specified categories of EPA actions, only one of which is involved here, namely "approving or promulgating any effluent limitation or other limitation." CWA § 509(b)(1)(E).[2] Jurisdiction to review all other EPA actions under the CWA is vested in the federal district courts by 28 U.S.C. § 1331 and by certain specific review provisions in Section 505 of the CWA, 33 U.S.C. § 1365.

The issue involved here is whether EPA's NPDES regulations are properly reviewable in the courts of appeals under Section 509(b)(1)(E). This issue turns on the distinction between effluent limitations under the Act and EPA's procedural regulations for issuance of NPDES permits.

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[1] *See, e.g.*, 42 U.S.C. § 7607(b)(1) (Clean Air Act); 42 U.S.C. § 300j-7 (Safe Drinking Water Act); 42 U.S.C. § 6976 (Resource Conservation and Recovery Act). *See also* n.18 below.

[2] 33 U.S.C. § 1369(b)(1)(E). Section 509(b)(1) is set forth below at 14-15.

The CWA prohibits the discharge of any pollutant into the nation's waters unless and until the discharger has obtained a NPDES permit under Section 402 of the Act, 33 U.S.C. § 1342. NPDES permits specify the types and amounts of pollutants an individual source may discharge. These specifications are based primarily on numerical "effluent limitations" guidelines promulgated by EPA pursuant to Sections 301 and 304 of the Act, 33 U.S.C. §§ 1311, 1314, which set forth the amounts of various pollutants which may be discharged by particular industries based upon the application of appropriate treatment technology. Such numerical effluent limitations have been before the Court previously,[3] but are not involved here.[4]

The NPDES regulations in question, 40 C.F.R. Parts 122-125, establish detailed policies and procedures for issuing and denying NPDES permits under Section 402 of the CWA. For example, the regulations govern who may sign permit applications and monitoring reports (40 C.F.R. § 122.6), the duration and termination of permits (40 C.F.R. §§ 122.9, 122.16), the sharing of information by states with EPA (40 C.F.R. § 123.10), EPA review of state permits (40 C.F.R. § 123.75), *ex parte* communications during permit hearings (40 C.F.R. § 124.78), and cross-examination during non-adversary panel hearings (40 C.F.R. § 124.121).

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[3] *See* E. I. du Pont de Nemours & Company v. Train, 430 U.S. 112 (1977).

[4] The Act also contains separate provisions governing discharges of pollutants by new sources and requiring the establishment of toxic pollutant standards and water quality standards. 33 U.S.C. §§ 1316, 1317, 1312 and 1313, respectively. These new source performance standards, toxic pollutant standards and water quality standards, which also form the basis for numerical limitations in permits, are not at issue in this case.

B. Proceedings Below

The current NPDES procedural rules, which extensively revised prior rules, were first promulgated on June 7, 1979 (44 *Fed. Reg.* 32854-956). The rules were then repromulgated, in slightly modified form, as part of EPA's consolidated permit regulations, 45 *Fed. Reg.* 33290-588 (May 19, 1980). These procedural rules are now codified at 40 C.F.R. Parts 122-125.

Challenges to both the June, 1979 NPDES and May, 1980 "consolidated permit" regulations were filed by industry and environmental groups in both federal district courts[5] and federal courts of appeals. Industry petitioners have consistently maintained that only the federal district courts have jurisdiction over these challenges. However, in light of the uncertainty over the courts of appeals jurisdiction under Section 509(b)(1) of the Clean Water Act, industry petitioners filed "protective" petitions for review in the courts of appeals, in order not to risk forfeiting entirely their rights to review should a court of appeals later decide the jurisdictional issue in its own favor.[6] This forfeiture problem arises because Section 509(b)(1) requires petitions for review in the courts of appeals to be filed within 90 days of the challenged Agency action. Failure to do so precludes the raising in any subsequent enforcement proceeding of any issue that could have been raised before a court of appeals. 33 U.S.C. § 1369(b)(2).

The confusion over this critical jurisdictional issue is graphically illustrated by EPA's own change in position on this

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[5] American Iron & Steel Institute, *et al.* v. Costle, No. 79-1218 (W.D. Pa.); American Petroleum Institute, *et al.* v. Costle, No. 79-0858, (W.D. La.); Appalachian Power Co., *et al.* v. Costle, No. 79-0188 (W.D. Va.); Chemical Manufacturers Ass'n., *et al.* v. EPA, No. 79-0184 (W.D. Va.); and Natural Resources Defense Council, Inc. v. Costle, No. 79-2948 (D.D.C.).

[6] *See* p. 9 n.12 below. The various petitions were eventually consolidated in the D.C. Circuit.

point. Throughout the long history of these proceedings, EPA has insisted that Section 509(b)(1) of the CWA does *not* vest original jurisdiction in the courts of appeals to review the challenged procedural regulations. The preamble to the June, 1979 regulations[7] stated unequivocally that review in a court of appeals under Section 509(b)(1) "is not provided for actions in issuing general regulations governing the issuance of NPDES permits." 44 *Fed. Reg.* 32855 (June 7, 1979). In pleadings filed in the various federal court proceedings, the Agency has reiterated that:

> "Neither the 1979 NPDES regulations nor the NPDES elements of the Consolidated Regulations fall within any of the categories specified in § 509(b)(1)."[8]

Not until EPA filed its brief below did it take the position that the challenged procedural regulations were "effluent limitation[s] or other limitation[s]" under Section 509(b)(1)(E).

The question of the jurisdiction of the court under Section 509(b)(1) of the CWA was presented to the D.C. Circuit on motion of the industry petitioners to dismiss their protective petitions for lack of jurisdiction. The industry parties argued that Section 509(b)(1) of the CWA does not apply to the NPDES procedural regulations. Industry petitioners also argued that substantial policy grounds exist for a narrow reading of the judicial review provisions of the CWA.

After briefing and oral argument, the D.C. Circuit denied the motion, holding that the NPDES regulations are "effluent limitation[s] or other limitation[s]" under Section 509(b)(1)(E) of the Act. The court acknowledged that, on its face, this

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[7] As the court below noted, these regulations are the same as the current NPDES regulations, with only "slight substantive modifications." Appx. A-4.

[8] EPA Motion to Transfer at 6 (August 22, 1980), *filed in* Virginia Electric and Power Company, *et al.* v. EPA, No. 79-1347 (4th Cir.).

provision appears to cover only numerical limitations on pollutant discharges, as also indicated by the usage of this phrase in the citizen suit provision of the Act. 33 U.S.C. § 1365(a). However, the court avoided this conclusion with the explanation that Congress sometimes uses the same word with different meanings. Appx. A-6 n.10. The court also admitted that the Third Circuit "has adopted the position industry urges here," but concluded that it did not agree with that Circuit. Appx. A-7. The D.C. Circuit expressed its view that national uniformity is "an important goal in dealing with broad regulations," and is "best served by initial review in a court of appeals." Appx. A-10 n.15. The court did not cite any statutory language or legislative history to support these conclusions.

As a result of the D.C. Circuit's determination, industry petitioners must litigate the merits of these and all other arguably similar regulations in the courts of appeals, or lose their right to challenge the substantive validity of such regulations in any subsequent enforcement proceedings.

REASONS FOR GRANTING THE WRIT

The Court should grant the petition for certiorari in this case for three reasons that the Court has traditionally deemed to warrant plenary review. First, the decision below creates a direct conflict among the circuits, and has upset settled expectations concerning judicial review under the Clean Water Act. Second, the decision below raises a major jurisdictional problem of nationwide importance that will continue to plague both the federal district courts and the federal courts of appeals, and to waste the time, energy, and resources of courts and litigants alike, unless resolved by this Court.[9] And third, the

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[9] *See, e.g.*, Harrison v. PPG Industries, Inc., 446 U.S. 578, 586 (1980), in which this Court granted certiorari "because of the importance of determining the locus of judicial review of the actions of EPA."

decision below is at odds with the language and history of the Clean Water Act. It presents fundamental questions of imperative public importance which only this Court can determine concerning the authority of the federal courts of appeals to circumvent the limits on their jurisdiction imposed by Congress, and the interpretation of a statute which, since its enactment, has occasioned considerable litigation. [10]

I. The Decision Below Creates A Conflict In the Circuits And Departs From Prior Decisions Of This Court

As the court below acknowledged, its decision is in direct conflict with the decision of the Court of Appeals for the Third Circuit in *American Iron & Steel Institute* ("AISI") v. *EPA*, 543 F.2d 521 (3d Cir. 1976), which held that the courts of appeals are without jurisdiction to review NPDES regulations that merely "prescribe the policy and procedures to be followed in connection with applications for permits." 543 F.2d at 526. A revised version of the regulations at issue in that case is part of the regulations under challenge here. [11] The court in *AISI* noted that the Act defined an effluent limitation as a restriction on the quantities, rates or concentrations of pollutants, and held that EPA's procedural regulations were not subject to review under Section 509(b) of the CWA. Although the D.C. Circuit advanced several theories on which to explain its disagreement with *AISI* v. *EPA*, the court acknowledged that it "specifically rejected the reasoning of *AISI*." Appx. A-7.

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[10] It is well established in this Court that a writ of certiorari may be granted to review an order below denying a motion to dismiss for lack of jurisdiction where, as here, the petition presents legal issues of great public importance that are fundamental to the further conduct of the case. Land v. Dollar, 330 U.S. 731 (1947); American Power & Light Co. v. S.E.C., 325 U.S. 385 (1945); Ickes v. Associated Industries of New York State, Inc., 320 U.S. 707 (1943) (per curiam).

[11] 40 C.F.R. §§ 122.63(g), 122.63(h).

The decisions of the two circuits cannot be squared. In *AISI*, the court recognized the clear jurisdictional barrier to federal appellate review of regulations that "do no more than prescribe the policy and procedures to be followed in connection with applications for permits," 543 F.2d at 526, stating:

> "[W]e do not believe, in view of the explicit and limited provisions of 33 U.S.C. § 1369(b)(1)(E) and (F), that Congress intended us to engage in deliberations of this sort in the absence of a full and comprehensive record." 543 F.2d at 528.

The D.C. Circuit's effort to explain its disagreement with *AISI* by stating that the Third Circuit has confused jurisdiction with "considerations of ripeness for review," Appx. A-8, illustrates the lack of clarity in its own reasoning. Under the D.C. Circuit's approach, petitioners would be forced to file protective petitions in the courts of appeals [12] as soon as any general procedural NPDES regulation is promulgated that *might* adversely affect the source in a future permit or enforcement proceeding, and then move to dismiss the petitions on ripeness grounds, [13] in order to be sure of preserving later review in the proper forum in the context of a permit or enforcement proceeding. We submit that the Third Circuit was neither confused nor incorrect in holding that Congress, by narrowly and expressly limiting original court of appeals jurisdiction under Section 509(b)(1), intended to preclude, not require, such a result.

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[12] The Court of Appeals for District of Columbia Circuit encouraged the filing of "protective" petitions in other contexts. *See, e.g.*, Investment Company Institute v. Board of Governors of the Federal Reserve System, 551 F.2d 1270 (D.C. Cir. 1977).

[13] In upholding its jurisdiction to review the challenged regulations, the court below stated, "The parties have not yet briefed the issue of the ripeness of the CPR's, and we do not today hold that any of them are ripe for review. We hold only that this court has authority under § 509(b)(1)(E) to review any CPR's that are ripe." Appx. A-8 n.13.

The court below also speculated that this Court's decisions in *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977), and *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193 (1980), decided after *AISI*, might have caused the Third Circuit to give a more "practical" and less "cramped" construction to the limits on its jurisdiction under Section 509(b). Appx. A-11. The D.C. Circuit's conclusion that the reasoning of the *du Pont* and *Crown Simpson* cases "strongly supports" its decisions (Appx. A-11) instead underscores its departure from the principles in these cases. Neither decision permits a court of appeals to ignore the express limits on its jurisdiction in order to reach a result it considers more "practical" than that directed by Congress. Moreover, as the court below acknowledged, Appx. A-11 n.16, the regulations at issue in those cases, particularly the *du Pont* case, were a far cry from the general policy and procedural regulations at issue here. In the *du Pont* case, the Court held merely that specific industry-wide effluent limitations guidelines setting forth numerical limitations fell within the courts of appeals' jurisdiction under Section 509(b)(1)(E) of the Act. That result is wholly consistent with the Third Circuit's holding in *AISI*. The same cannot be said for the D.C. Circuit's effort to use the *du Pont* decision as a wedge to expand its jurisdiction over regulations wholly unrelated to specific numerical "effluent limitation[s] or other limitation[s]."

The broad construction given to Section 509(b) of the CWA by the D.C. Circuit is also inconsistent with the approach taken by the Second Circuit in interpreting this judicial review provision:

> "[I]t seems to us that when a jurisdictional statute sets forth with such specificity the actions of an administrative agency which may be reviewed in the courts of appeals, a litigant seeking such review of an action that is not specified bears a particularly heavy burden."

Bethlehem Steel Corp. v. *EPA*, 538 F.2d 513, 517-18 (2d Cir. 1976). *See also, Central Hudson Gas & Electric Corp.* v. *EPA*,

587 F.2d 549, 555-57 (2d Cir. 1978). We submit that this approach taken by the Second and Third Circuits is more sound than the expansive assertion of jurisdiction by the D.C. Circuit below.

II. The Decision Below Involves Recurring Questions Concerning Judicial Review Under The Clean Water Act

Allowing the decision below to stand would raise a host of new problems eliminated by Congress' narrow and careful delineation of court of appeals' jurisdiction in Section 509(b)(1). If regulations as broad and general as those at issue here are considered to be "effluent limitation[s] or other limitation[s]," it is difficult if not impossible to limit the term rationally in future cases. While the court below insisted that its decision "does not turn § 509(b)(1) into a comprehensive review provision that Congress did not intend it to be," Appx. A-8 n.14, it fails to provide any basis whatsoever for drawing reasonable distinctions. [14]

As a result of the conflict between the circuits on this critical jurisdictional point, the many thousands of industrial dischargers throughout the country that are subject to NPDES requirements can have no certainty as to the proper forum for judicial review of any NPDES regulations. The consequence will necessarily be a deluge of "protective" petitions in the federal courts of appeals each and every time NPDES regulations are promulgated.

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[14] As a result, virtually any restrictions of any sort on industrial dischargers (and there has yet to be an NPDES regulation that does not arguably impose *some* type of restriction) must now be challenged within 90 days in the courts of appeals. The standard announced by the court below is whether the regulations impose any " 'restriction on the untrammeled discretion of the industry' that existed before passage of the CWA." Appx. A-9.

Considering that the Clean Water Act and the regulations thereunder are not only one of the most important and complex but also one of the most hotly debated and extensively litigated regulatory programs in existence today,[15] the potential burden on the courts and on litigants is truly staggering. The procedural background of this case alone helps illustrate the magnitude of the problem. Because of the uncertainty as to court of appeals jurisdiction over the consolidated permit regulations, no fewer than twelve petitions for review were filed in the courts of appeals, and at least five complaints were filed in the district courts. After three years of active litigation, the parties are no nearer to litigating the merits of the challenged regulations than they were in June, 1979. In fact, given the D.C. Circuit's statements on the "ripeness" issue, another long, preliminary issue lies ahead to be briefed and decided by that court.[16]

Although the court below apparently believed that its decision would lessen the burden on the courts by requiring initial review in a court of appeals of such regulations, Appx. A-9-10, and A-10 n.15, that is clearly not the case. As indicated above, the D.C. Circuit has stated that many of such regulations may not be ripe for review, and might thus be reviewable in a particular factual context in connection with an enforcement proceeding in a district court or a suit in a court of appeals concerning the issuance of an NPDES permit. To preserve such later review, however, petitioners will be compelled to file protective petitions in the courts of appeals and then move to dismiss the petitions on ripeness grounds, thereby adding to the courts' burdens.

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[15] This Court's decisions in *Crown Simpson* and *du Pont*, *supra*, cite only a few of the many district court and court of appeals decisions on NPDES issues.

[16] The parties before the D.C. Circuit agree that certain of the NPDES issues are ripe for review but others are not yet ripe, and have advised that court of their intention soon to submit a motion to dismiss the unripe issues.

Moreover, with regard to future challenges to regulations under the CWA, the D.C. Circuit's opinion has left even the status of court of appeals jurisdiction in complete confusion. The court below noted that:

> "Industry petitioners argue that if the CPR's are reviewable directly in a court of appeals, virtually any action under the CWA will be so reviewable, thus contravening the congressional intent. EPA contends however — and industry does not dispute — that certain actions under the CWA are outside of § 509(b)(1). *See* EPA Brief at 27. * * * We do not decide that we would lack jurisdiction in all the cases EPA lists. . .." Appx. A-8 n.14.

Virtually all EPA regulations under the Clean Water Act will from now on be subject to challenge in *both* the federal courts of appeals [17] and the district courts, where burdensome litigation and conflicting decisions as to jurisdiction are again likely. Only this Court can bring to a halt the tremendous waste of judicial resources that will necessarily follow if the D.C. Circuit's decision is allowed to stand.

III. The Decision Below Contravenes Congress' Limited Grant Of Jurisdiction To The Courts Of Appeals And Conflicts With The Structure And Purpose Of The Clean Water Act

It is one of the most basic principles of federal jurisdiction that the courts of appeals are courts of limited jurisdiction, with only such jurisdiction as is expressly granted to them by statute. *American Federation of Labor* v. *NLRB*, 308 U.S. 401 (1940); *Assessors* v. *Osbornes*, 9 Wall. 567, 76 U.S. 567 (1869). Although there may be excellent policy reasons for doing so, the courts may not expand that limited jurisdiction without express authorization from Congress. *A.F. of L.* v. *NLRB*, 308

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[17] As noted at p.5 above, the preclusive nature of Section 509(b)(1) review in effect mandates such "protective" suits.

U.S. at 411-412. It is the responsibility of this Court to ensure that the statutory limits and bounds of the lower courts' jurisdiction are not exceeded. *Sumner* v. *Mata*, 449 U.S. 539, 547 n.2 (1981); *Louisville & Nashville Railroad Co.* v. *Mottley*, 211 U.S. 149, 152 (1908).

While Congress could have vested original jurisdiction in the courts of appeals to review virtually all regulations of general applicability under the CWA promulgated by EPA, as it did under other environmental statutes,[18] it declined to do so. Instead, Section 509(b)(1) provides for original court of appeals jurisdiction over EPA actions in only six enumerated situations. These are EPA actions:

> "(A) in promulgating any standard of performance under section 1316 of this title,
>
> "(B) in making any determination pursuant to section 1316(b)(1)(C) of this title,
>
> "(C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title,
>
> "(D) in making any determination as to a State permit program submitted under section 1342(b) of this title,

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[18] *See, e.g.*, 42 U.S.C. § 7607(b)(1) (authorizing court of appeals review of eight specified categories of action and "any other nationally applicable regulations promulgated or final action taken" under the Clean Air Act); 42 U.S.C. §§ 300j-7(a)(1) and (a)(2) (authorizing District of Columbia Court of Appeals review of four specified categories of action and "any general regulation for the administration" of the Underground Injection Control program under the Safe Drinking Water Act, and court of appeals review in the appropriate circuit of "any other regulation"); and 42 U.S.C. § 6976(a)(1) (authorizing the filing with courts of appeals of "a petition for review of action of the Administrator in promulgating any regulation" under the Resource Conservation and Recovery Act).

> "(E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, or 1316 of this title, and
>
> "(F) in issuing or denying any permit under section 1342 of this title, ..." 33 U.S.C. § 1369(b)(1).

As is apparent from the language of Section 509(b)(1), these six enumerated actions fall into two basic categories: (1) review of final agency action in approving or disapproving state NPDES programs and individual NPDES permits, and (2) review of the technical effluent standards and limitations required by the Agency to be incorporated, where applicable, in all NPDES permits.

The language and legislative history of the Act, as well as the relevant case law, confirm that the phrase "effluent limitation or other limitation," as contained in Section 509(b)(1)(E), refers to numerical restrictions on the quantities of pollutants that may be discharged. The phrase "effluent limitation" is defined in the Act as:

> "[A]ny restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." 33 U.S.C. § 1362(11).

"Effluent limitations" have been described as "a term of art . . . restricting the quantities of pollutants that enterprises in a given industry may discharge." [19]

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[19] Crown Simpson Pulp Co. v. Costle, 599 F.2d 897, 902 (9th Cir. 1979), *reversed on other grounds*, 445 U.S. 193 (1980). "[E]ffluent limitations are technical specifications of the quantities of various polluting substances that a permittee may lawfully discharge." Montgomery Environmental Coalition v. Costle, 646 F.2d 568, 574 (D.C. Cir. 1980). Effluent limitations are "specified maximum levels of pollution allowed to be discharged by an individual source." Environmental Defense Fund, Inc. v. Costle, 657 F.2d 275, 279 (D.C. Cir. 1981). *See also* EPA v. California ex rel. State Water Resources Control Board, 426 U.S. 200, 204-05 (1976).

Although the phrase "effluent limitation or other limitation" is not defined in the Act, the phrase is used in no fewer than eight other sections of the Act. Not a single one of these sections refers, either expressly or by implication, to regulations other than numerical specifications on pollutant levels.[20] The citizen suit provision of the Act authorizes any interested person to commence a suit in federal district court against "any person . . . in violation of . . . an effluent standard or limitation under this chapter." 33 U.S.C. § 1365(a)(1). This section, which defines the violation of an "effluent standard or limitation" to include "an effluent limitation or other limitation" under Sections 301 and 302, confirms that only numerical specifications

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[20] *See* 33 U.S.C. §§ 1318(a) (record keeping relating to the development of "any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard of performance"); 1341(a)(4) review of the manner in which a facility shall be operated to insure that no "effluent limitations or other limitations or other applicable water quality requirements" will be violated); 1341(b) (EPA required to provide information on "effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria" to the states or other Federal departments or agencies); 1341(d) (certification required to set forth "effluent limitations and other limitations, and monitoring requirements" to assure compliance with effluent limitations and standards); 1362(17) ("schedule of compliance" defined to include enforceable sequence of actions leading to compliance with "an effluent limitation, or other limitation, prohibition or standard"); 1365(f) (for purposes of citizens' suits, "effluent standard or limitation" is defined to include "an effluent limitation or other limitation under section 1311 or 1312"); 1367(d) (employee protection provisions do not apply to deliberate violations of "any prohibition of effluent limitation or other limitation"); and 1370 (states may not adopt or enforce any "effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance" less stringent than federal standards).

were intended. 33 U.S.C. § 1365(f). As the Senate Committee on Public Works explained the citizen suit provision:

> "Enforcement of pollution regulations is not a technical matter beyond the competence of the courts. The citizen suit provision is consistent with principles underlying the Federal Water Pollution Control Act, *that is the development of clear and identifiable* requirements. Such requirements should provide manageable and precise benchmarks for enforcement. [21]

There is no question that the D.C. Circuit has asserted jurisdiction over regulations which have virtually nothing to do with identifiable limitations on discharges. The court below so acknowledged:

> "These regulations do not set any numerical limitations on pollutant discharge. Instead, they are a complex set of procedures for issuing or denying NPDES permits . . .."
>
> "The CPR's, everyone agrees, are far more general [than regulations based on precise, technical information and applied to particular types of point sources] and rest dominantly on policy choices." Appx. A-4, A-9.

The court nevertheless determined that, as a matter of policy, it would be more "practical" to extend its jurisdiction under Section 509(b)(1)(E) to include such regulations. Appx. A-11. It is clear from the language of the statute that such an extension of the court of appeals' jurisdiction is unwarranted. [22]

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[21] S. Rep. No. 92-414, 92d Cong., 1st Sess. 81 (1971) (emphasis added).

[22] Significantly, the court below cited nothing in the language or legislative history of the Act that would warrant expanding its jurisdiction in this fashion. Moreover, even if the statute and legislative history were at all ambiguous on that point — which industry petitioners submit they are not — the maxims of *noscitur a sociis* and *ejusdem generis* apply "in order to avoid the giving of unintended breadth to the Acts of Congress." Jarecki v. G D. Searle & Co., 367 U.S. 303, 307 (1961). *See also*, Third National Bank in Nashville v. Impac Limited, Inc., 432 U.S. 312, 322-23.

Whether or not the various policy reasons cited by the court below [23] are valid bases for expanding court of appeals jurisdiction is an issue for Congress. *A.F. of L.*, 308 U.S. at 411-412. In the absence of such congressional authority, the courts are without power to take such action unilaterally, even for the best of "policy" reasons. *Id. See also, Harrison*, 446 U.S. at 593.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

THEODORE L. GARRETT
PATRICIA A. BARALD
CORINNE A. GOLDSTEIN
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
(202) 662-6000
Attorneys for Petitioners
Chemical Manufacturers Association, et al.

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[23] The primary policy reasons given by the court below are (1) national uniformity, (2) judicial economy, and (3) court of appeals expertise in reviewing "broad policy-oriented rules." Appx. A-9-10 and A-10 n.15.